

Preventing, Uncovering and Prosecuting the Enemy Within: New Jersey's Top Legal Guns Target Employee Fraud & Theft

The FBI calls employee theft "the fastest growing crime in America." Law firms are often called upon to seek restitution from and pursue prosecution of the offenders.

BY MILES Z. EPSTEIN
EDITOR, COMMERCE

STATISTICS SHOW THAT WORKPLACE THEFT IS a serious issue and the impact of theft on small businesses in particular can be devastating. In the following case studies, top law firm managing partners discuss how their firms helped address internal fraud and theft at companies big and small. Preventing employee theft, as you will read, is serious business.



Anderson Kill & Olick, P.C.

By Steve Pudell, Esq.
Managing Partner

We represented a major clothing manufacturer and separately, an apparel retailer, each of whom lost millions of dollars to ongoing thefts of merchandise by warehouse employees. In both cases, we encouraged prompt notice to the clients' commercial crime insurance companies and cooperation with law enforcement authorities in the investigation and prosecution of the dishonest employees. We also worked with the clients' accounting team to quantify the loss. The proofs of loss for insurance purposes necessarily relied upon the clients' inventory records, since the employees left intentionally unreliable paper trails in an effort to cover up their theft. In each claim, the insurance company denied coverage based on the so-called "inventory loss exclusion," contending they had no obligation to pay for theft losses proven through inventory records. We litigated and prevailed in persuading the carriers to drop that defense, based on independent proof of the employees' dishonesty obtained through confessions, convictions and other corroborating evidence. So long as there is independent proof of dishonesty, policyholders may use their own inventory records to establish the value of stolen property. The inventory loss exclusion has a much narrower application than insurers will readily admit, and policyholders should press for the coverage they bought.



Connell Foley, LLP

By Michael X. McBride, Esq.
Managing Partner

A company hired an individual to upgrade its computer system. During his short employment, the employee disagreed with his owner over his performance and conduct. The employ-



ee suddenly departed without completing the upgrades, and the computer system experienced problems, including missing data. A forensic examination revealed that a significant amount of data had been copied by the departing employee and was also difficult to retrieve. This examination also showed that certain unexplainable work performed was not necessary for the upgrades. An expert opined that the employee's work was an attempt at sabotage. Correcting the problems cost the company significant monies. The company was advised to commence an action against the employee under the Computer Fraud and Abuse Act (CFAA). During the litigation, the former employee asserted that he had never intended to maliciously harm his former employer. He claimed that his actions had been authorized. While this defense did not stand up, the issue of authorization created unwarranted litigation risks and costs. While the company had protected its data from disclosure to third persons, its computer use policy did not prohibit use for any reason adverse to the company. The company's policy was amended to include this prohibition.



Giordano, Halleran & Ciesla, P.C.

By Michael J. Gross, Esq.
Managing Partner

Months after an employee had resigned, an e-mail was mistakenly sent to the ex-employee's former e-mail account. A supervisor who reviewed the e-mail realized it contained an agreement between one of our client's current business partners and the ex-employee's new employer. Since the ex-employee had previously entered into a restrictive covenant agreement with our client, this e-mail provided definitive evidence that the ex-employee was violating his post-employment, non-compete and non-solicit obligations. To protect our client, Jay Becker, chairman of the Labor and Employment Practice Area filed an Order to Show Cause seeking temporary restraints. These restraints would prevent the ex-employee from continuing to violate his restrictions and would pre-

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vent his new employer from using our client's confidential and proprietary information that it learned from the ex-employee. On the evening before the injunction hearing, the new employer agreed to not only terminate our client's ex-employee, but agreed to cease and desist doing business with certain companies as a result of information it received from our client's ex-employee. Further, the ex-employee agreed to honor his non-compete agreement for an additional year and forwarded new business to our client to atone for the revenue lost as a result of his actions.



**Herten, Burstein, Sheridan, Cevalco,
Bottinelli, Litt & Harz, LLC**

*By Steven B. Harz, Esq.
Managing Partner*

Our firm assisted a business client in seeking recompense from a former employee who converted significant company time. The individual held a supervisory position in the client's service-oriented business, and directed a number of his subordinates to perform work on his personal business projects during their work hours. To hide their activity, the subordinates recorded the time spent on the individual's personal projects using administrative billing numbers. The client became aware of the misconduct during a review of its employees' e-mail activity pursuant to a valid electronic communications policy. The individual was discharged for theft of company time. The matter was complicated when the individual made baseless allegations of discrimination. Rather than entertain the meritless claims, we brought a civil suit for theft of time and assisted the client in filing a criminal complaint. The matter resolved itself in our client's favor. Presumably due to the pressure created by our actions and the lack of any defense, the individual agreed to pay a significant figure to our client in damages and also to release his claims of discrimination. Since these issues arose, our client has devoted considerable additional attention to monitoring its employees' timekeeping and billing practices.



Riker Danzig Scherer Hyland & Perretti LLP

*By Glenn A. Clark, Esq.
Managing Partner*

Riker Danzig successfully defended York Claims Service, Inc., an insurance claim adjusting firm, in an arbitration filed by Colonial Cooperative Insurance Company (CCIC) and a former York employee who had joined CCIC. The dispute centered on who would be responsible for paying law firms that, York contended, CCIC had engaged to defend CCIC insureds by means of co-opting the employee who hired the firms and who falsified his superiors' consent thereto. Under an agreement, York was responsible for paying the firms unless CCIC "selected" them. York contended that CCIC induced the employee to engage in a lengthy series of fraudulent acts, including unnecessarily



Although workplace theft is probably somewhat more widespread among blue-collar workers, the damage done by more senior employees is usually far greater.

engaging the firms to replace the firm that York had retained. CCIC sought more than \$2.2 million in damages, plus declaratory relief stating that York was obligated to continue to service, without compensation from CCIC, all remaining claims until resolved and closed. The arbitrator ruled in York's favor, found the employee's credibility to be "questionable," denied all CCIC claims and awarded damages to York on its counterclaim against CCIC. As a result, three lawsuits against York filed by the firms in New York, in which York had asserted third-party indemnity claims against CCIC and the former York employee, were resolved in York's favor. York's claims against its former employee ultimately were settled.



Wolff & Samson PC

*By David Schlossberg, Esq.
Managing Director*

Wolff & Samson represents clients in myriad commercial matters, including internal investigations of theft, fraud and embezzlement. Recently, one of the firm's clients discovered that their newly hired chief financial officer had embezzled a substantial sum over a nine-month period—a period that coincided with the entire term of his employment. The embezzlement was discovered when prosecutors from an adjoining county knocked on the client's doors to notify it that they had a warrant to arrest its employee for embezzling a significant sum from his prior employer. Recognizing that there was the potential for abuse, the client immediately reached out to Wolff & Samson for guidance on the employment and criminal issues. Indeed, the firm's attorneys guided the client through a detailed internal investigation to uncover the full scope of the fraud, monitored the criminal process to ensure that prosecutors were armed with the necessary documentation, and assisted the client in implementing protocols to avoid a similar recurrence in the future and seeking restitution through the criminal process. As a result of the firm's guidance, the client has taken the necessary steps to avoid future theft, and was able to recover the majority of its losses without resorting to litigation. ■